BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

COMMENTS OF SINCLAIR BROADCAST GROUP, INC. ON NOTICE OF PROPOSED RULE MAKING

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Summary

Sinclair Broadcast Group, Inc. ("Sinclair") is filing these comments to address the Commission's local television ownership rule. Given the current media environment, there is no justification for any local television ownership rule. Moreover, the Commission's current rules are completely irrational, and their retention is certainly not "necessary in the public interest." The Commission has never explained how it arrived at the arbitrary "Eight Voices Test." The Eight Voices Test yields anomalous results because independent sources can and do disagree about which stations are in what markets, and the test treats all markets as if they were identical, which is simply not the case. The "Top 4" Rule is also irrational because it applies only to assignees/transferees and new stations and does not apply to other existing stations. Moreover, stations are free to change affiliations after a purchase, which generally impacts ratings, and can thus circumvent the Top 4 rule. In any event, the rule is not related to the purported goal of ensuring diversity of local newscasts.

The absurdity of the current rules is illustrated by the fact that a broadcast television station owner may be prohibited from owning more than one station in a market, while at the same time a large multi-faceted media company may own extensive media properties in that same market, such as a television station, the dominant cable system, a national broadcast network, national cable networks, local cable news channels, Internet service providers, and various other media-related entities. There is nothing wrong with such media ownership interests, and no harm from such interrelationships has been demonstrated. Yet the Commission prohibits the ownership of more than one television station in most DMAs. This utterly illogical and disparate treatment of owners of local television stations, who cannot possibly achieve the

same level of influence as a huge media conglomerate, demonstrates the nonsensical operation of the rules the Commission has imposed.

The purported goals behind the local television ownership rule—competition, viewpoint diversity, and localism—do not survive scrutiny. There is no competition-based justification for retaining the local television ownership rule. The overwhelming evidence indicates that there is vigorous competition in the current media marketplace. Consumers and advertisers view programming provided over the multitude of non-broadcast network channels and broadcast stations as substitutes, and content providers treat both as comparable purchasers. Programs and advertising aired on broadcast and non-broadcast channels are the same. Television broadcast stations also compete with a significant number of other outlets for advertising dollars such as radio stations, newspapers, outdoor display advertising, direct mail, and even the Internet. Because of such competition, a local television duopoly does not exert market power. Sinclair has conducted various studies which are included with its comments, including a study by the noted telecommunications economist Dr. Robert Crandall. (Exhibit 1). Dr. Crandall, who studied markets where Sinclair has a duopoly, a local marketing agreement, a joint sales agreement, or an outsourcing agreement between stations, concluded that these arrangements "within a single DMA have not allowed Sinclair to exert market power in local advertising markets." (Exhibit 1). In any event, any such concerns are more appropriately addressed by the antitrust agencies, which already review broadcast merger transactions.

Moreover, the Commission has provided no definition of "viewpoint diversity" that supports the local television ownership rule. If, by viewpoint diversity, the Commission means "local news," then the Commission must consider in its calculus all sources of local news, including local cable news channels, local newspapers, radio, and the Internet. If the

Commission intends a broader definition of viewpoint, then certainly national news, non-traditional news, and entertainment and other programs, which raise awareness of political and social issues, must be included in the calculation of voices. Under any definition, the realities of the media marketplace indicate that diversity is abundant, and no ownership restrictions can be justified.

In any case, the local television ownership restrictions bear no rational relationship to the purported goal of increasing "local news." Local television stations are free to rebroadcast the local news of another station or to broadcast no local news at all. A television station which is experiencing financial problems is more likely to eliminate the expense of airing a local newscast, while a station that is able to achieve cost efficiencies by operating as a duopoly is more likely to add local news.

The purported goal of localism is likewise flawed. Section 307(b), which the Commission cites as the rationale for localism, is an allocation tool which is irrelevant to the processing of assignment and transfer applications under the local television ownership rule. Furthermore, there is no evidence that the Commission's policies promote localism.

Finally, the Commission must reject the legal anachronism that is the underpinning of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The scarcity rationale supporting that decision does not reflect the realities of the competitive modern media marketplace, and the ownership restrictions impermissibly impinge upon broadcasters' First Amendment rights. Accordingly, for all the aforementioned reasons, Sinclair respectfully requests that the Commission repeal its local television ownership rule.

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ON NOTICE OF PROPOSED RULE MAKING

Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making, FCC 02-249, in the above-captioned proceeding, released September 23, 2002 (the "NPRM"). Sinclair is a television broadcasting company that owns, provides programming services pursuant to local marketing agreements ("LMA"), or provides sales services to sixty-two television stations in thirty-nine markets across the United States. In view of the number of stations Sinclair owns and programs, the length of its experience as a television broadcaster—stemming from the earliest days of UHF broadcasting—and its wealth of experience as an innovator in the use of local marketing agreements, Sinclair is uniquely qualified to offer comments in this proceeding.

I. INTRODUCTION

In the NPRM, the Commission announced that it was initiating a comprehensive review of its media ownership rules. This third biennial review of the ownership rules follows two court decisions which found fundamental flaws in the existing rules. *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027 (D.C. Cir. 2002), *rehearing granted,* 293 F.3d 537 (D.C. Cir. 2002) and *Sinclair Broadcast Group, Inc. v. FCC,* 284 F.3d 148 (D.C. Cir. 2002), *rehearing denied*, 2002 U.S. App. LEXIS 16619 (D.C. Cir. Aug. 12, 2002). In *Fox*, the Court vacated the cable/broadcast cross-ownership rule and remanded the Commission's decision to retain the national television ownership cap because the justifications for retention of the rules (to preserve competition and diversity) were not supported by the record and were, therefore, arbitrary and capricious, and because the Commission had failed to demonstrate that the rules were "necessary in the public interest" as required under Section 202(h) of the Communications Act. In *Sinclair,* the Court held that the Commission's eight voices exception to the television local ownership rule was arbitrary and capricious in part because the Commission had not explained why it included only broadcast television stations as "voices"—a definition that was inconsistent with the broader definition adopted for the radio/TV cross-ownership rule, which included major newspapers and cable television as voices.

The NPRM states that the Commission's ownership policies have traditionally focused on advancing three goals: (1) diversity, (2) competition, and (3) localism. At the same time, Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review periodically its ownership rules and justify that they are "necessary in the public interest as a result of competition." Accordingly, as the NPRM acknowledges, the Commission must take into account the current status of competition in the media marketplace, and, in fact, the NPRM seeks comment on how changes in the media marketplace, including the proliferation of programming outlets and sources, affect the definition of product market for antitrust purposes and the Commission's goal of "viewpoint diversity."

Set forth below in more detail are Sinclair's legal arguments and empirical data supporting its position that no local ownership rule is necessary. The absurdity of the current local ownership rule is illustrated by numerous examples[1] where a large media entity permissibly controls a wide variety of media outlets and sources in a market, yet in that same market a broadcast television station owner is prohibited from owning more than one television station by operation of the Commission's arbitrary and irrational duopoly rule. One example is set forth below.

In the Rochester, New York market, AOL Time Warner: (1) owns the dominant cable system with over 300,000 subscribers, (2) owns an extremely popular Internet service, (3) owns CNN and Headline News—as well as other cable channels like HBO, Cinemax, TBS (a superstation), TNT, Cartoon Network, and Turner Classic Movies, (4) owns the WB network, (5) owns WB16, a local cable channel that airs WB programming, (6) owns R News, the local cable news channel, and (7) can buy a broadcast station if it so chooses. Moreover, WB16 is virtually indistinguishable from a broadcast station as AOL Time Warner markets it by the call sign WRWB and positions the channel in its basic tier in the middle of other broadcast stations as shown in Exhibit 2 (Time Warner Rochester channel lineup).[2] AOL Time Warner controls a

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[1] There are numerous similar examples across the country which Sinclair will provide upon request if the Commission believes that it will assist its rulemaking determination.

[2] "The WB has a 100-plus-market strategy of programming cable channels as affiliates where there are no available traditional broadcast outlets." *WB gains new outlet in Gainesville*, Broadcasting & Cable, June 24, 2002 *available at* http://www.broadcastingcable.com/index

great deal of the content that reaches this market—and others. Presumably, the Commission believes that neither competition, localism, nor "viewpoint diversity" is adversely affected under such circumstances, and Sinclair has no objection to any actual or potential ownership interest enjoyed by AOL Time Warner (or any other media corporation). But, at the same time, a television station owner who owns no other media interest in the market cannot acquire a second television station in the market because there would be fewer than eight independently owned broadcast television stations remaining. This completely irrational treatment of local television station owners, who cannot possibly achieve the level of influence possessed by media conglomerates, such as AOL Time Warner, demonstrates the incongruous operation of the rules the Commission has imposed.

Sinclair's comments focus on the local television ownership rule as that is an area where Sinclair has substantial experience.[3] As demonstrated in these comments and the extensive studies that Sinclair has conducted which accompany these comments, given the vast proliferation of media outlets and sources and the ability of companies like AOL Time Warner and Viacom to own multiple media outlets, the local television ownership rule and its associated "voices" test makes no sense. The explosion in the number of media voices is repeatedly acknowledged in the Media Ownership Working Group studies and has also been the subject of

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.asp?layout=story_stocks&articleId=CA224907&pubdate=06/24/2002&stt=001&display=search Results (last visited Dec. 23, 2002).

[3] As noted earlier, Sinclair was an innovator in the use of local marketing agreements, and it has also entered into joint sales agreements and outsourcing agreements with other television station owners in various markets. Sinclair participated in the Commission's previous local ownership rule making and succeeded in having portions of the final rule remanded by the United States Court of Appeals for the D.C. Circuit. *See Sinclair Broadcast Group, Inc. v. FCC, supra*.

comments by Commissioners. Indeed, in the December 2, 2002 edition of the *New York Times,* Chairman Powell is quoted as saying: "When I look at the trends in television over the last 20 to 50 years, I see a constant and increasing explosion in variety. In the purported golden age of television there were three networks."[4]

Given the number of voices that now exist, ownership of more than one television station in a given market does not pose any threat to the public interest. No undue influence is gained by owning more than one local television station that justifies imposing limits on ownership. The purported goals of diversity and localism are vague and essentially meaningless in the era of the Internet, hundreds of cable channels, and direct broadcast satellite television. Any concerns about competition are more appropriately addressed by the Department of Justice or the Federal Trade Commission, which already review broadcast station mergers. There is no evidence that broadcasters need an additional special guardian to address any potential antitrust concerns.

In these comments, Sinclair will first address the statute that governs the Commission's biennial ownership review, next the modern media marketplace, and finally the constitutional implications of the Commission's local television ownership restrictions.

II. PURSUANT TO SECTION 202(h) OF THE 1996 ACT, THE COMMISSION MUST DEMONSTRATE THAT ANY OWNERSHIP RULE THAT IT RETAINS IS NECESSARY IN THE PUBLIC INTEREST

Section 202(h) of the 1996 Act provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The

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4 Jim Rutenberg, *Fewer Media Owners, More Media Choices,* N.Y. Times, Dec. 2, 2002 at C1, *available at* http://www.nytimes.com/2002/12/02/business/media/02MEDI.html.

> Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

As the Commission has acknowledged, "section 11 places the burden on the Commission to make the requisite determinations; no particular burden is placed on the opponents or proponents of a given rule."[5]

In *Fox Television Stations, Inc. v. FCC*,[6] the court stated that this section "carries with it the presumption in favor of repealing or modifying the ownership rules."[7] Such an analysis is supported by both the express language of the statute and the declared purpose of the 1996 Act "to promote competition and reduce regulation."[8] Indeed, in rejecting the argument that the Commission should take incremental steps in revising its rules, the court described the congressional mandate of Section 202(h) as akin to Admiral Farragut's famous command: "Damn the torpedoes! Full speed ahead."[9] In addition, in its original opinion the court stated: "The statute is clear that a regulation should be retained only insofar as it is necessary in, not

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5 *Year 2000 Biennial Regulatory Review—Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, 220 FCC LEXIS 4670, ¶ 6 (Sept. 24, 2002); *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, Report and Order*, 16 FCC Rcd. 22668, ¶ 25 (2001).

6 280 F.3d 1027 (D.C. Cir. 2002), *reh'g granted*, 293 F.3d 537 (D.C. Cir. 2002).

7 280 F.3d at 1048; *Sinclair Broadcast Group, Inc. v. FCC*, *supra* at 159.

8 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) at Preamble.

9 280 F.3d at 1044.

merely consonant with, the public interest."[10] The statute continues to be clear, and this remains the correct interpretation of it.

The operative words in the statute are "whether any of such rules are necessary in the public interest as the result of competition." In light of this express mandate, it is clear that Congress intended the Commission to apply a higher standard than "continuing to serve the public interest" in considering whether to retain its ownership rules.[11] Rather, unless the rules are "necessary in the public interest as the result of competition," they must be repealed or modified.[12] Such an interpretation is also consistent with the dictionary definition of "necessary" which means "absolutely essential" or "indispensable"[13] and with court cases involving other

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[10] *Id.* at 1050. On rehearing, the court amended that part of the decision because it concluded that the parties did not fully brief the issue and that, in any event, the higher standard was not dispositive of the case as the Commission failed to justify the retention of its rule under even the most lenient public interest standard. 293 F.3d at 540.

[11] Commissioner Martin has stated that "necessary" in section 202(h) should mean something closer to "indispensable" or "essential." *Separate Statement of Commissioner Kevin J. Martin, Implementation of the Cable Television Consumer Protection And Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition*, 2002 FCC LEXIS 3150 (June 28, 2002); *see also Separate Statement of Commissioner Kevin J. Martin, Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, 2002 FCC LEXIS 3665 (July 26, 2002) (Necessary "should be read in accordance with its plain meaning, to mean something closer to 'essential.' In any event, I believe that it should mean something more than merely 'useful,' 'appropriate,' 'consistent with,' or 'important.'").

[12] It is a maxim of statutory construction that statutes must be read to give meaning to every word over an interpretation that renders certain words superfluous. *See, e.g., Hoffman v. Connecticut Dep't of Income Maintenance*, 429 U.S. 96, 103 (1989).

[13] *The American Heritage Dictionary of the English Language* (Fourth Edition 2000) ("1. Absolutely essential. See synonyms at indispensable. 2. Needed to achieve a certain result or effect; requisite . . . . 3. a. Unavoidably determined by prior conditions or circumstances; inevitable . . . . b. Logically inevitable. 4. Required by obligation, compulsion, or convention.").

provisions of the 1996 Act, which have stated that the "ordinary and fair meaning" of the word "necessary" is "that which is required to achieve a desired goal."[14]

As these comments will show, in view of the vigorous competition and abundant diversity among advertising outlets and sources such as television, radio, cable, satellite, newspapers, and the Internet, the Commission must conclude that its local television ownership rule is not necessary and should be repealed.

III. THERE IS NO JUSTIFICATION FOR THE COMMISSION TO REVIEW BROADCAST STATION MERGERS ON GROUNDS OF PROTECTING COMPETITION

A. Broadcast television is not the proper antitrust market for assessing competition

The Commission has asked whether there are "unique attributes" of broadcasting that require the Commission to define and measure diversity and competition without reference to other media.[15] Sinclair believes that given the alternative sources of news, entertainment, information, and advertising outlets from a variety of long-standing sources, including, primarily, radio, newspaper, and cable television, broadcast television has never enjoyed such an exalted status. Moreover, even accepting for argument's sake the existence of possible "unique aspects" the Commission once thought were possessed by the broadcast television media, such aspects, as discussed in more detail below, have disappeared in today's marketplace where:

- cable and satellite providers have reached 86.4% penetration;

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[14] *GTE Service Corp. v. FCC,* 205 F.3d 416 (D.C. Cir. 2000) (interpreting "necessary" in the context of section 252 of 1996 Act and stating that any definition must accord with "the ordinary and fair meaning of the word, *i.e*., so as to limit "necessary" to that which is required to achieve a desired goal."). *See also AT&T Corp. v. Iowa Util. Bd*., 525 U.S. 366 (1999).

[15] *NPRM* ¶¶ 42, 61.

- cable network ratings equal or exceed that of broadcasters;
- national cable news networks have become ubiquitous sources of information;
- the popularity of children's programming on cable television has forced over-the-air broadcasters to substantially curtail children's programming;
- certain major sporting events are available only on cable channels; and
- cable-only shows and their stars are routinely nominated for and awarded prestigious Emmy awards for television programming.

Networks and producers view non-broadcast channels as acceptable substitutes for broadcast television stations. Ratings indicate that viewers accept cable networks as substitutes for broadcast television stations. It is time for the Commission to acknowledge the reality of the marketplace by erasing the hard line it draws between broadcast television stations and non-broadcast channels and abandoning its antiquated ownership restrictions.

1. Consumers view cable programming as a substitute for broadcast television

The growth and success of cable conclusively demonstrates that the Commission's ownership restrictions are both wholly unnecessary and based on a view of the industry that is outdated.[16] Cable ratings have been steadily increasing while broadcast ratings have been on the decline—a fact supported by several of the Media Ownership Working Group studies.[17] Many

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16 The Commission expressly recognized this fact almost fourteen years ago. *Review of Rules and Policies Concerning Network Broadcasting by Television Stations: Elimination or Modification of Section 73.658(c) of the Commission's Rules,* 4 FCC Rcd 2755, ¶ 16 (1989) ("The broadcast networks and their affiliates now face, and will increasingly face in the future, the need to compete aggressively both for programming and for viewers with nonbroadcast networks.").

17 *See* Jonathan Levy et al., *Broadcast Television: Survivor in a Sea of Competition* (Sept. 2002); *see also* Scott Roberts et al., *A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000* (Sept. 2002) (illustrating the growth of cable).

of the most critically acclaimed and more popular television shows today are cable programs.[18] Recent reports indicate that basic cable networks scored higher ratings than the broadcast networks on nine nights during the first two weeks of the November 2002 sweeps.[19] During the week of November 4 through 10, 2002, cable delivered 29.5 million homes—eighty-six thousand more than broadcast.[20] Broadcast television, meanwhile, saw a decline of 1.9 million viewers over the same measuring period in 2001.[21]

Cable enjoys even greater success in prime time. Since 1994, cable's prime time ratings have nearly doubled while broadcast television's ratings have declined dramatically. (*See* Exhibit 3) (ratings summaries of 1994, 1998, and 2001). In the third quarter of 2002, cable delivered 30.6 million homes and garnered a share of 51.9, the first time it has ever achieved a share greater than 50, during prime time.[22] By mid-December 2002, reports indicated that cable

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18 HBO, in particular, has received many accolades for its original programming such as *The Sopranos*, *Sex in the City*, *Curb Your Enthusiasm*, *Oz*, *Band of Brothers*, *Six Feet Under*, and *The Larry Sanders Show*. *Sex in the City* won the Emmy Award for Outstanding Comedy Series and *The Sopranos* won a Golden Globe for Best Drama. James Gandolfini and Edie Falco have each won two Emmys for Outstanding Lead Actor and Actress in a Drama Series for their work on *The Sopranos*. Last year, Michael Chiklis of FX's *The Shield* won the Emmy for Outstanding Lead Actor in a Drama Series. MTV has enjoyed surprising success and acclaim for *The Osbournes*. In fact, one television critic stated that *The Osbournes* have "become essential television in the way 'The Sopranos' is. More and more, it seems, essential television is on cable." Tom Shales, *Essential Lessons from 'The Osbournes'*, Electronic Media, Dec. 2, 2002, at 23.

19 *See Basic cable gains on broadcast*, Broadcasting & Cable, Nov. 11, 2002 *available at* http://www.broadcastingcable.com/index.asp?layout=story&doc_id=108219&display=breakingNews (last visited Dec. 15. 2002).

20 http://www.cabletvadbureau.com/02_03Season/week7.htm (last visited Dec. 23, 2002).

21 *Id*.

22 http://www.cabletvadbureau.com/02_03Season/week1.html (last visited Dec. 23, 2002).

would beat broadcast's fourth-quarter share of prime time households 45.3 to 45.2, giving cable a prime time share victory in three out of four quarters for 2002.[23] Other year-end research indicated that basic cable networks will reach a forty-eight percent share compared to broadcast's forty-five percent.[24] Moreover, given that the most-watched program among children under the age of twelve is Nickelodeon's *SpongeBob SquarePants*, it is likely that today's youth are virtually oblivious to any distinction between a broadcast television station and a cable channel.[25] Despite hard evidence that viewers watch cable networks as much as broadcast stations, the Commission has held fast to its dated beliefs and currently does not consider cable as an alternative to broadcast television for purposes of its ownership rules.

2. Consumers view programming provided over DBS systems as a substitute for broadcast television

The same reasons that justify treating broadcast television and cable channels as substitutes require that the Commission acknowledge the same for programming provided over DBS systems.[26] DBS is available nationwide[27] and there are more than eighteen million DBS

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23 *Cable on pace to take share crown*, Broadcasting & Cable, Dec. 12, 2002 *available at* http://www.broadcastingcable.com/index.asp?layout=story&doc_id=109397&display=breaking News (last visited Dec. 13, 2002).

24 Michael Starr & Aly Sujo, *More Eyes Watching Cable Than Broadcast TV*, N.Y. Post, Dec. 19, 2002 *available at* http://nypost.com/seven/12192002/business/65009.htm (last visited Dec. 19, 2002) (citing Nielsen Media Research).

25 Frazier Moore, *'SpongeBob' springs to top*, Wash. Times, Oct. 29, 2002 *available at* http://www.washtimes.com/entertainment/20021029-83157194.htm (last visited Dec. 13, 2002).

26 To the extent that other multichannel video programming distributors are present in a specific market, they too must be considered substitutes for ownership purposes.

27 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244, ¶ 55 (2002).

subscribers today.[28] The current growth rate of DBS subscriptions surpasses even that of cable.[29] Moreover, in 1999 Congress enacted the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") which contained laws permitting DBS providers to retransmit local broadcast stations into local markets, putting DBS systems on a more competitive footing with cable systems.[30] The Commission has also recently acknowledged the competitive impact that DBS has had on the media industry noting that "DBS is the largest competitor to cable."[31]

3. Content providers view non-broadcast channels and broadcast stations as substitutes

Multichannel video programming distributors, such as cable and DBS, are competitors to broadcasters for syndicated programming that has historically only been on over-the-air broadcast stations. The wide availability of popular programs such as *Friends*, *Seinfeld*, and *The Drew Carey Show* on non-broadcast channels illustrates that content providers treat both non-broadcast network channels and broadcast stations as eligible buyers.[32] Cable networks are also

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28 *NPRM* ¶ 25; *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, (Hearing Designation Order), CS Docket No. 01-348, FCC 02-284, ¶ 265 (Oct. 18, 2002).

29 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report,* MB Docket No. 02-145, FCC 02-238, ¶ 13 (Dec. 31, 2002) (reporting 14% increase in DBS subscribers versus 0.4% increase for cable between 2001 and 2002).

30 *NPRM* ¶ 122; 17 U.S.C. § 122; 47 U.S.C. § 338.

31 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244, ¶ 56 (2002). *See also NPRM* ¶ 53.

32 Exhibit 4 (TBS advertisement featuring its lineup of sitcoms including *The Drew Carey Show*, *Friends*, *Home Improvement*, and *Seinfeld*). Note that this advertisement appeared as a full-page ad in *USA Today* and *People*. *See, e.g.,* USA Today, Oct. 1, 2002 at 5D *and* People, Oct. 21, 2002 at 32-33. Most broadcasters could not afford or justify such expensive advertising.

competitors for first-run programming. For instance, many sporting events now appear on cable channels.[33] Recently, HBO bid on telecasting the Emmy awards.[34] The trend by national broadcast networks to repurpose first-run programs on non-broadcast channels also indicates that national broadcast networks draw little distinction between broadcast stations and non-broadcast network channels as outlets for their programming.[35]

See also Allison Romano, *Rainbow brightens its stripes*, Broadcasting & Cable, Oct. 7, 2002, at 18 (Bravo to debut *The West Wing* in the fall of 2003).

33 Examples of marquee sporting events covered by cable are endless. ESPN telecasts a prime time NFL game every Sunday. *See* www.nfl.com/tvradio/2002nationalsked.html (last visited Dec. 13, 2002). Major League Baseball playoff games, America's national pastime, have aired on FX, FoxFamily, and ABC Family. *Fox still likes baseball, despite the costs*, Broadcasting & Cable, Apr. 1, 2002 *available at* http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleId=CA205317&pubdate=04/01/2002&stt=001&display=searchResults (last visited Dec. 13, 2002). *See also* Allison Romano, *Cameras on the Court*, Broadcasting & Cable, Oct. 28, 2002 at 44 (reporting 223 NBA games on cable and 15 on ABC and TNT's exclusive coverage of All-Star Game and conference finals). USA Network has aired early round coverage of the U.S. Open tennis championship for eighteen years. Allison Romano, *USA continues to net U.S. Open*, Broadcasting & Cable, Aug. 13, 2002 *available at* http://www.broadcastingcable.com /index.asp?layout=story_stocks&articleId=CA238820&pubdate=08/13/2002&stt=001&display =searchResults (last visited Dec. 13, 2002).

34 Paige Albiniak, *The Emmy Goes . . . Nowhere*, Broadcasting & Cable, Nov. 18, 2002, at 6.

35 *See* Exhibit 5 (listing examples of repurposed shows). Repurposing is the re-airing of a broadcast network show on a non-broadcast network within a short period of time, usually within one week. Reverse repurposing is the re-airing of a non-broadcast show on a broadcast station within a short period of time. *Id*. The show *Monk* is an example — it airs first on the USA Network and then during prime time on ABC.

B. Advertisers do not consider broadcast television to be a relevant antitrust product market

The Commission also asked whether it should continue to focus solely on broadcast advertising as the relevant product market.[36] The evidence indicates that broadcast stations compete with other outlets for advertising dollars, and thus, the relevant market includes much more than broadcast. (*See* Exhibit 6, Declaration of Jeff Sleete). Research conducted by Bear Stearns demonstrates that the share of advertising dollars received by broadcast has declined precipitously since 1990 while cable advertising has increased nearly three hundred percent. (*See* Exhibit 7). The same conclusion is reached by one of the Media Ownership Working Group studies which concludes that broadcast television is "swimming in a sea of competition."[37]

In 1996 in connection with a review of its proposed Columbus, Ohio LMA by the Department of Justice, Sinclair hired Economists Incorporated ("EI") to analyze the impact of the LMA on broadcast advertising rates in the Columbus DMA. (Exhibit 8). EI concluded that "local advertising on broadcast television was not a relevant market for antitrust purposes." (Exhibit 8, p. 1). That conclusion was based on (1) actual advertiser purchasing patterns in Columbus which demonstrated that firms targeting the same consumers use a varied mix of media in proportions that vary across advertisers and across time; (2) interviews conducted with Columbus advertisers and advertising agencies which indicated that broadcast television competes with a variety of substitute media for local advertising revenue; and (3) two

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36 *NPRM* ¶ 61.

37 Jonathan Levy et al., *Broadcast Television: Survivor in a Sea of Competition*, at 139 (Sept. 2002).

econometric studies that found that the number of competing broadcast television stations had no effect on either the price of advertising time sold by television stations in a particular area or the profitability of a station.

EI found that advertising on local cable systems was an option that advertising executives in Columbus frequently mentioned as a good substitute for spots on broadcast television. EI noted that since 1989 cable operators had tripled their available local advertising inventory. (Exhibit 8, pp. 6-8). The EI study was conducted in 1996, and cable's share of local advertising has undoubtedly grown. The EI study also found that advertisers in Columbus viewed radio spots and print advertising as good substitutes for commercials on broadcast television.[38]

Sinclair also submitted an analysis supporting the benefits of the transaction, including expanding the output of local news, cross-promotion, sales management consolidation, complementary programming, and cost savings. (Exhibit 9) (Memorandum prepared by Sinclair for the DOJ Antitrust Division regarding the Columbus LMA).[39] The DOJ apparently concurred with Sinclair that this transaction enhanced competition and generated efficiencies without adversely affecting advertisers.

For this proceeding, Sinclair conducted a survey of the general sales managers or directors of sales in each of the thirty-nine markets in which Sinclair sells broadcast television advertising. (Exhibit 10). The survey was conducted completely anonymously, and Sinclair did

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[38] The EI study's findings are also consistent with the Media Ownership Working Group study that concluded that cable, newspapers, and radio serve as substitutes for consumers. Joel Waldfogel, *Consumer Substitution Among Media* (Sept. 2002).

[39] In fact, the DOJ has either approved or declined to challenge Sinclair's past proposed station acquisitions and LMA arrangements.

not inform responding personnel of the purpose of the study. The results demonstrate that broadcast television sales personnel believe that they face significant competition for advertiser dollars from cable television, daily newspapers, and radio and also, to a slightly lesser extent, direct mail, weekly newspapers, and outdoor advertising.[40] The majority of the responding parties also indicated that they had lost business to and taken business from each of those competitors. (Exhibit 10). Additionally, a strong majority (seventy percent) of responding television sales professionals indicated that if television stations were to agree to raise the advertising rates ten to fifteen percent across all dayparts, advertisers would spend more advertising dollars elsewhere, and there would be a resulting decrease in broadcast television advertising revenues. (Exhibit 10). This survey and the EI study strongly indicate that other forms of advertising are substitutes for advertising on broadcast television and the definition of relevant product market should, accordingly, be broadly defined to include those advertising competitors.

C. Mergers generate efficiencies, not market power

As the Commission acknowledges, mergers can increase efficiency by generating economies of scale for broadcast stations.[41] Joint operations achieve efficiencies by eliminating redundant studio and office space, equipment, and personnel. For example, a study conducted by Sinclair concluded that combining certain operations of two television stations in Tallahassee,

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[40] Some sales personnel also indicated that the Internet and magazine advertisements provided some competition. (Exhibit 10).

[41] *NPRM* ¶ 74; *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, ¶¶ 40, 65-66, 70 (1999).

Florida would produce savings of over $600,000 annually. (Exhibit 11). The operating efficiencies associated with owning two stations in a market is evidenced by Tribune Company's purchase of two Sinclair stations in the Indianapolis, Indiana DMA, WTTV-TV, Indianapolis and satellite station WTTK-TV, Kokomo. Tribune, the owner of WXIN(TV), Indianapolis, estimated that with the benefits of a duopoly in the Indianapolis market it would obtain $11.36 million in cash flow in 2002.[42] Sinclair estimated its non-duopoly 2002 cash flow at $5.95 million.[43] Thus, Tribune believed it would achieve $5.4 million in duopoly benefits. (*See* Exhibit 12). Ownership restrictions discourage these potentially socially beneficial arrangements.[44]

For this proceeding, Sinclair hired Dr. Robert Crandall, a noted telecommunications economist, to conduct a study of the markets in which Sinclair operates to determine whether joint arrangements involving two broadcast stations in a market contributed to any market power for Sinclair. Dr. Crandall studied various markets where Sinclair has duopolies, local marketing

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42 The $125 million purchase price divided by the 11x multiple of anticipated broadcast cash flow equals $11.36 million. (*See* Exhibit 12).

43 The $125 million purchase price divided by the 21x multiple of anticipated broadcast cash flow equals $5.95 million. (*See* Exhibit 12).

44 Members of the public tend to be unaware of the economic benefits provided by common ownership or joint operation. It is well known, however, that certain "citizen groups" oppose media concentration and are able to mobilize to speak at public hearings such as the one the Commission will hold in Richmond, Virginia. News Release, *FCC Chairman Michael Powell Announces Public Hearing in Richmond, Va. on Media Ownership*, Dec. 4, 2002. Moreover, it is unlikely that advertisers or advertising agencies will publicly come out in favor of relaxing ownership restrictions, even though they themselves benefit from being able to purchase advertising on more than one station through fewer negotiations. Accordingly, it is unlikely that any useful information will be gleaned from a public hearing. *See* Editorial, *Onward to Richmond*, Broadcasting & Cable, Dec. 9, 2002, at 40 ("As Powell hinted in grudgingly agreeing to the hearing, it won't add much of value to the record.").

agreements, joint sales agreements, or outsourcing agreements. Dr. Crandall found that joint arrangements between stations "within a single DMA have not allowed Sinclair to exert market power in local advertising markets. Nor have, multi 'Big-4' service arrangements permitted Sinclair to exert such market power." (Exhibit 1, p. 4). Thus, "cost-cutting efficiencies, rather than an attempt to exert market power, were the principal motivation for Sinclair's provision of service to multiple stations within a DMA." (Exhibit 1, pp. 19-20).

Dr. Crandall also found serious problems with the Media Ownership Working Group study conducted by C. Anthony Bush,[45] including a critical assumption about advertising expenditures that does not comport with reality. (Exhibit 1, pp. 23-25). These problems raise serious issues regarding the validity of the Bush study.

D. Any competitive concerns related to a broadcast station merger are more appropriately addressed by the antitrust agencies.

The Commission also asked whether antitrust concerns in advertising markets are more appropriately governed by antitrust agencies.[46] Sinclair believes that they are. The DOJ and FTC already review broadcast station mergers and LMA arrangements, and there is no logical reason or evidence to suggest that such review is deficient.[47] While courts, in the past, have

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45 C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* (Sept. 2002).

46 *NPRM* ¶ 59.

47 *NPRM* ¶ 59; *see* John Eggerton, *FTC revamps merger reviews*, Broadcasting & Cable, Dec. 13, 2002 *available at* http://www.broadcastingcable.com/index.asp?layout=print_page&doc_id=109430 (last visited Dec. 13, 2002). *See also* John Eggerton, *Courtroom Maneuvers*, Broadcasting & Cable, Sept. 16, 2002 at 16 (reporting DOJ review of merger of Univision Communications, Inc. and Hispanic Broadcasting Corp.); Press Release, Dep't of Justice, *Justice Department Requires News Corporation and Chris-Craft Industries to Make Divestiture in Salt*

recognized that the Commission has authority to determine its rules based on concerns regarding competition and anticompetitive behavior, this body of precedent is founded on logic and authority that pre-dates the enactment of Section 202(h).[48] An appropriate reading of this section requires that the Commission now demonstrate that any ownership rule that requires the Commission to continue to assess potential anticompetitive consequences of mergers be necessary in the public interest.[49] Without such a demonstration, the Commission should defer competition issues to those agencies entrusted with the general enforcement of the antitrust laws.

Moreover, the Commission itself has noted "[a]s the steward of the Communications Act, the Commission is charged with evaluating the potential benefits and harms to the <u>viewing and listening public, not to advertisers</u>."[50] Even assuming *arguendo* that increases in media concentration can lead to increases in advertising rates,[51] there is no clear or demonstrated harm to viewers. Under a classic antitrust analysis, the standard, theoretical result of increased media

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Lake City, (Apr. 11, 2001) *available at* http://www.usdoj.gov/atr/public/ press_releases/2001/ 7959.htm (last visited Dec. 13, 2002).

48 *See National Broadcasting Co. v. United* States, 319 U.S. 190 (1943); *United States v. Radio Corp.* 358 U.S. 334 (1959); *and Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (upholding Commission's use of competition and antitrust values under the "public interest" standard of section 303).

49 Certainly, the Commission may review a merger on other grounds, provided it has separately justified such review under Section 202(h) which, as Sinclair demonstrates below, the Commission is hard pressed to do.

50 *NPRM* ¶ 59 (emphasis added).

51 *See* Crandall study, Exhibit 1 (joint arrangements between broadcast stations do not increase market power).

concentration is not less broadcast programming, but higher advertising rates and less advertising—which most people would consider beneficial to viewers.[52]

IV. THE COMMISSION HAS PROVIDED NO DEFINITION OF VIEWPOINT DIVERSITY THAT SUPPORTS MEDIA OWNERSHIP RESTRICTIONS

In the NPRM, the Commission noted that "[v]iewpoint diversity has been the touchstone of the Commission's ownership rules and policies"[53] and sought comment on "whether viewpoint diversity should continue to be a primary goal" of the Commission's ownership rules.[54] While the D.C. Circuit has upheld the constitutionality of the Commission's diversity goals in the abstract, the court has demanded that the Commission adequately justify its ownership restrictions and not simply "cry 'diversity!'"[55] This requirement is even more imperative in light of the congressional mandate of section 202(h) of the Telecommunications Act of 1996, which requires that the Commission affirmatively justify that its ownership

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52 The only study provided by the Commission specifically regarding this issue was inconclusive. Brendan A. Cunningham & Peter J. Alexander, *A Theory of Broadcast Media Concentration*, at 18, 23 (Sept. 2002) (stating that theoretically an increase or decrease in the amount of broadcasting resulting from consolidation depends on the precise behavioral response of consumers to increased advertising—empirical data the study did not provide).

53 *NPRM* ¶ 35.

54 *Id.* ¶ 41. The Commission identifies three additional types of diversity: outlet, source, and program. *Id.* ¶ 34. The Commission, however, states that outlet and source diversity are proxies for viewpoint diversity. *Id.* ¶ 41. The Commission also concedes that program diversity is well-served by market forces. *Id.* ¶ 39; *see also* Mara Einstein, *Program Diversity and the Program Selection Process on Broadcast Network Television* (Sept. 2002). Sinclair's comments, therefore, focus on the inherent flaws in the Commission's overarching goal of viewpoint diversity.

55 *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 170 (D.C. Cir. 2002) (Sentelle, J. concurring and dissenting); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002).

regulations are necessary in the public interest. At a minimum, the Commission must define in clear, unambiguous language exactly what it means by viewpoint diversity—a task which the Commission has avoided for nearly forty years. The Commission's failure to propose, much less define, a meaningful and concrete definition of viewpoint fatally undermines any ownership restriction. Moreover, as Sinclair demonstrates below, any logical definition fails to support ownership restrictions in light of the tremendous and increasing number of sources and outlets that provide similar programming.

If, by viewpoint diversity, the Commission means diversity of "local news," then the Commission must consider in its calculus all sources of local news including local cable news channels, local newspapers, radio, and the Internet. If the Commission intends a broader definition of viewpoint, then certainly national news, non-traditional news, and even entertainment and other programs, which raise awareness of political and social issues, must be included in the calculation of voices. Regardless, under any definition of viewpoint diversity, the realities of the media marketplace indicate that diversity is abundant, and no ownership restrictions can be justified.

In fact, as discussed below, the Commission has never proven a link between diversity of ownership and diversity of local news. Even assuming that such a relationship exists, the Commission must consider the roles played by local cable news channels, newspapers, radio, and the Internet in providing local news to a community. Given the abundance of these news sources, the Commission cannot justify any local ownership restrictions. For similar reasons, any effort to justify ownership restrictions based on localism fails. Moreover, Section 307(b), which the Commission cites as the rationale for localism, is an allocation tool which is irrelevant to the processing of assignment and transfer applications under the local television ownership rule. Furthermore, there is no evidence that the Commission's policies promote localism.

A. Any attempt to define viewpoint diversity in reference to local news fails to support ownership restrictions

The Commission's historic conception of viewpoint diversity has focused on diversity of local news.[56] If this is what is meant by diversity, the irrationality of the current rules is astounding. Under the current rules, the owner of a local television station, which provides absolutely no news content whatsoever, could be prohibited from buying another station, which also provides absolutely no news content. In contrast, the owner of a cable television system, with a twenty-four hour a day local news channel, that also owns the leading all news/talk radio channel in the market, would be permitted to purchase a local television station with the market's most popular news channel. Such an illogical result is so absurd and unsupportable as to be, by definition, arbitrary and capricious.

1. The Commission has never proven a link between diversity of ownership and diversity of local news

Thirty-eight years ago the Commission justified its local television ownership restrictions solely on the assumption that "it is more reasonable to assume that stations owned by different people will compete with each other."[57] This unsupported rationale continues to exist and has

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[56] *NPRM* ¶ 78 (referring to local news presentation as "the heart of our diversity goal").

[57] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, *Report and Order*, 45 FCC 1476, ¶ 3 (1964).

evolved into the ambiguous concept of promoting "viewpoint diversity."[58] In 1999, the Commission again acknowledged that its local television ownership restrictions were not based on hard data but on "intuitive logic and common sense."[59] Similarly, in this NPRM, the Commission provides no analysis that diversity of ownership will lead to diversity of local news.[60]

The Commission has not explained and has never affirmatively demonstrated why it places such a high value on broadcast television local news when, in fact, any possible "viewpoint" oriented programming contained in local news is quite limited. Sinclair's analysis of the content of a sample of Fox affiliates' newscasts indicates that approximately seventy-eight percent of a typical local news broadcast is comprised of national news, commercial advertisements, weather forecasts, sports, and other non-local news content leaving approximately twenty-two percent of the newscast for potential viewpoint oriented local news content. (Exhibit 13). Accordingly, if a station, like a local Fox affiliate, broadcasts one hour of news a day, approximately thirteen minutes would potentially contain viewpoint oriented content—a mere 0.9% of a twenty-four hour broadcast day.

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58 *NPRM* ¶ 35. The Commission identifies four different types of diversity, but ultimately appears to rely on only "viewpoint diversity" as a justification for ownership restrictions. *Id*. ¶¶ 33-38.

59 *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, ¶ 22 (1999).

60 *NPRM* ¶ 78; *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policies and Rules*, 14 FCC Rcd 12903, ¶ 66 (1999).

To test the Commission's theory that there is a link between ownership and local news, Sinclair conducted an informal survey of 199 UPN, WB, and PAX affiliates, located in markets without duopolies, to determine the percentage of those stations providing local news. (*See* Exhibit 14). Sinclair's survey revealed that nearly sixty-six percent of those stations aired no news whatsoever. Approximately fifteen percent rebroadcast the news of another station. Only nineteen percent of the stations surveyed indicated that they produced their own newscasts. These numbers indicate that the majority of these stations are currently not producing local news, but nonetheless cannot be co-owned with another in-market television station. This evidence shows that the Commission's regulations preventing co-owned stations in these markets do little, if anything, to enhance the diversity of local news.[61]

If the "touchstone" of ownership restrictions is viewpoint diversity and viewpoint diversity is exemplified through local news, then it is difficult to understand how prohibiting someone from purchasing a station that has no news programming of any kind serves any public interest.[62] By permitting the purchase, a new owner may begin producing local news or may rebroadcast the newscast of another station.[63] At worst, the new owner will continue not to air

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61 However, as discussed below, there are economic incentives for television station owners or news programmers to provide diversified local news to stations operating in the same market. *See infra* note 72-73 and accompanying text.

62 In markets where the rules currently prohibit co-ownership of television stations, such as Baltimore, Maryland, Columbus, Ohio, Dayton, Ohio, and Charleston, West Virginia, Sinclair provides news via (now attributable) LMAs, the divestiture of which has either been stayed or grandfathered. Based on costs and finances, it is likely that, without such agreements, those stations would be unable to provide any local news programming.

63 Rebroadcasts generally air in a different timeslot, thereby accommodating viewers with different schedules.

local news, and the total amount of local news remains the same. The Commission has recognized a similar lack of detriment in the context of mergers of emerging networks, stating explicitly in the Dual Network proceeding that the record supports the argument that the "combination of a major network with UPN or WB would not affect the independence of an existing news organization or cause a reduction of diversity in news or public affairs programming."[64]

Remarkably, one broadcast station could provide all of another station's local news through the use of an LMA and not conflict with any ownership restrictions under the present rules. An LMA is only attributable to the brokering station if it provides more than fifteen percent of the brokered station's broadcast hours per week.[65] If providing local news via an LMA consumes less than fifteen percent of those hours (i.e. up to 3.5 hours per day, 7 days per week), the brokering station could provide every minute of local news without ownership of the brokered station being attributable. If diversity of local news is the "heart" and "touchstone" of the Commission's ownership restrictions, the LMA attribution rules would be more focused on the provision of local news and not programming in general. Instead, the Commission's policies bear no rational relationship to the articulated goal.

2. The Commission must consider local cable news channels, newspapers, radio, and the Internet for diversity purposes

The past decade has witnessed a proliferation of local news sources, including local cable news networks and the Internet. Nationwide, there are over twenty local cable news channels.

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64 *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule,* 16 FCC Rcd 11114, ¶ 38 (2001).

65 47 C.F.R. § 73.3555.

(Exhibit 15) (listing local cable news networks and detailing their coverage and ownership). Of these, two have started in the past year,[66] and AOL Time Warner has announced that it is rolling out local cable news channels in five additional markets.[67] Accordingly, there is strong evidence that such channels are an emerging trend, which the Commission in another proceeding acknowledged "compete with local broadcast stations and national cable networks."[68]

The first local cable news network, News 12 Long Island, began offering twenty-four-hour coverage of Nassau and Suffolk counties in New York in 1986.[69] The News 12 website states that Nielsen phone surveys indicate that viewers prefer News 12 for local news coverage.[70] The noteworthy success and growth of local cable news networks belie the notion that only broadcast television stations can provide local news coverage.

Evidence also suggests that co-produced newscasts, such as those produced pursuant to an LMA,[71] may actually increase variety in newscast programming.[72] The Commission has

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66 Exhibit 15.

67 Allison Romano, *Cable news-net battle brews—in Raleigh?*, Broadcasting & Cable, Mar. 25, 2002 *available at* http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleId=CA202873&pubdate=03/25/2002&stt=001&display=searchResults (last visited Dec. 15, 2002).

68 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report,* 17 FCC Rcd 1244, ¶ 14 (2002) (emphasis added).

69 *See* http://www.news12.com/NewCDA/aboutnews12/0,5926,%26region%3DLI%26rid%3D5%26tab%3D,00.html (last visited Nov. 19, 2002).

70 *See* http://www.rainbow-media.com/regbus/news12.html (last visited Nov. 19, 2002).

71 *See NPRM* ¶ 95 (referring to increased news programming in Viacom's duopoly markets and seeking comment on the impact LMAs have had on production of local programming).

already acknowledged that a common owner has economic incentives to program different entertainment formats.[73] Such incentives also exist for news programming. For example, in Baltimore, Sinclair owns WBFF and, pursuant to a local marketing agreement, produces the news for WNUV.[74] Contrary to what the Commission's policies would presuppose, the stations' newscasts target different audiences and provide different news content. (*See* Exhibit 16, Declaration of Scott Livingston). As Mr. Livingston explains, WNUV's demographic is younger and includes a materially larger percentage of minorities, women, and Baltimore City residents than WBFF's demographic make-up. (Exhibit 16). Accordingly, WNUV's news programming covers stories designed to address the lives of its viewers. (Exhibit 16). For example, WNUV's "Newsmaker" segment focuses on issues of particular interest to the residents of Baltimore City and is unique to WNUV's newscast. (Exhibit 16). To Sinclair, this makes good economic sense, and it should make good policy sense to the Commission.

Centralizing the news operations of two stations is an efficient way for both stations to provide local news coverage.[75] Under such an arrangement some of the stories aired may

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72 Additionally, as discussed above in Part IV.A.1, the vast majority of WB, UPN, and Pax stations do not provide news.

73 *NPRM* ¶¶ 80, 82; *see also Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule,* 16 FCC Rcd 11114, ¶ 37 (2001); *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524, ¶¶ 62-63 (1995).

74 As in many markets where news is provided pursuant to an LMA, if WNUV were an independent station, it would likely not be able to produce its own news, or it would contract with someone else for the provision of news. Thus, the operation of the present duopoly rule would either result in the status quo or less local news programming. *See supra* note 62 and accompanying text.

75 On the national level, estimates place the cost savings resulting from a merger of ABC News and CNN at $200 million annually. *See* James Bates, *CNN, ABC Stir Rumors, No Bulletin,*

overlap, but many stories run by independent stations are also substantially similar in content. Furthermore, any assumption that common ownership necessarily leads to identical news coverage and commentary is refuted by one of the Media Ownership Working Group studies which concluded that common ownership of a newspaper and television station in the same community generally does not result in the same pattern of news coverage and commentary.[76] As discussed earlier, joint operations also achieve efficiencies by eliminating redundant studio and office space, equipment, and personnel and increasing the resources that can be spent on actual news-gathering.

In addition to local cable news channels, newspapers, radio, and the Internet are all sources of local news and contribute to "diversity" in the marketplace. One of the Commission's own Media Ownership Working Group studies concluded that these sources are substitutes for the provision of local news.[77] This study found the "clearest evidence" of substitution between broadcast television and newspapers and broadcast television and the Internet and evidence of substitution between broadcast television and radio.[78] The Commission cannot choose to ignore these alternative sources of local news by disregarding common sense and empirical evidence.

L.A. Times, Nov. 1, 2002 *available at* http://www.latimes.com/business/la-fi-cnn1nov01.story (last visited Dec. 15, 2002).

[76] David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (Sept. 2002).

[77] Joel Waldfogel, *Consumer Substitution Among Media* (Sept. 2002).

[78] *Id*. at 3.

3. The goal of "localism" provides no justification for ownership restrictions

In the NPRM, the Commission states that it has historically pursued policies aimed at encouraging localism and that "[l]ocalism remains an important attribute of the broadcast media industry."[79] The Commission defines localism as "the provision of programming that meets local communities' needs and interests."[80] To the extent this interest is the same as the provision of "local news," the abundance of voices discussed above also invalidates this as a basis for any ownership restriction.

In support of localism as a policy goal, the Commission cites Section 307(b) of the Communications Act of 1934, which states: "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[81]

The problem with the NPRM's analysis is twofold. First, Section 307(b) does not speak in terms of "localism" but rather in terms of assuring that frequencies are equitably distributed among communities and states. Second, the concept underlying Section 307(b) makes sense when the Commission is deciding among a number of mutually exclusive applications for new broadcast stations in different communities as it used to do in the comparative hearing context or

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79 *NPRM* ¶¶ 69-71.

80 *Id.* ¶ 70.

81 47 U.S.C. § 307(b).

as it now does in auctions for mutually exclusive applications proposing different communities. Similarly, it makes sense for the Commission to take account of Section 307(b) in making a determination as to whether a station should be permitted to change its community of license or make a modification of its facilities that may implicate the equitable distribution of frequencies among communities and states.

However, Section 307(b) has never been applied to decisions involving assignments or transfers of existing stations or to decisions involving the multiple ownership rules, unless some sort of modification of the facility is also proposed. Nor has Section 307(b) ever been used to require local ownership or local programming. The Commission has never used or even referred to Section 307(b) when deciding whether one television owner should be permitted to own more than one station in a DMA and has never considered whether a proposed owner is local or non-local or whether its proposed programming includes "local" material in making decisions under the television duopoly rule.

The local TV ownership rule does not serve, and has never served the goal of promoting localism. There is no logical reason that a non-locally owned television station cannot serve local needs, and the Commission provides none.[82] As the NPRM observes, all television stations have a public interest responsibility of serving the problems, needs, and interests of their communities of license and surrounding areas. This responsibility, however, has nothing

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[82] *Cf. Bechtel v. FCC,* 10 F.3d 875 (D.C. Cir. 1993). In that case, the court found that the integration preference used in comparative broadcast cases was without foundation and stated: "While the Commission makes it a central focus of *allocation*, the Commission takes no interest whatsoever in the matter when it comes to *transfers* or even in the continuing conduct of the original licensee." *Id*. at 887.

whatsoever to do with whether the local television ownership rule should be retained, and elimination of the rule will not affect this responsibility.

B. Any broader definition of viewpoint diversity certainly fails to justify imposing restrictions on media ownership

While the Commission sometimes appears to equate viewpoint diversity with diversity of local news, it has also suggested that "viewpoint" is something more. In defining voices for purposes of the radio/TV cross-ownership rule, the Commission decided to count cable systems as a voice because they were a source of local news and "most programming is either originated or selected by the cable system operator."[83] Similarly, in the NPRM, the Commission found that "at a minimum, DBS contributes to viewpoint diversity through its editorial control over channel selection."[84] Focusing on channel and programming selection is not consistent with the Commission's pronouncement that local news is the "heart" of viewpoint diversity. In any event, consideration of these sources, along with other similar sources the Commission has previously deemed voices in its cross-ownership rules—*e.g.,* radio and newspapers—demonstrate that diversity is abundant.

Moreover, the Commission does not demonstrate that cable or DBS operators have an unqualified ability to exercise editorial control over programming selection. Cable operators are subject to must-carry obligations and may be required to provide access channels for public affairs, educational, and governmental programming pursuant to their local franchise

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[83] *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policies and Rules*, 14 FCC Rcd 12903, ¶ 113 (1999); *NPRM* ¶ 119.

[84] *NPRM* ¶ 121; *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, (Hearing Designation Order), CS Docket No. 01-348, FCC 02-284, ¶ 50 (Oct. 18, 2002) ("DBS operators do contribute to viewpoint diversity").

agreements.[85] Similarly, DBS must reserve four percent of its channel capacity for noncommercial programming.[86] Furthermore, in the modern marketplace where viewers can choose between a variety of multichannel video programming distributors, such as cable, DBS, home satellite dishes ("HSD"), open video systems ("OVS"), multichannel multipoint distribution service ("MMDS"), satellite master antenna television systems ("SMATV"), and Internet video,[87] it is more likely that consumer preferences, not owner preferences, ultimately decide the programs an operator carries.

Accordingly, every non-broadcast channel should be treated as a "voice," rather than treating the 100 plus channels provided over any particular system as one "voice." Cable (or any other multichannel video programming distributor) simply cannot be treated as one voice in an era where the same or similar programming regularly airs on both broadcast and non-broadcast channels, where viewers do not distinguish between non-broadcast channels and broadcast stations, where non-broadcast network programs are enjoying unprecedented ratings success, and where such programming is winning awards previously won only by broadcast television programs.[88]

Ratings data supports counting each individual non-broadcast channel as a voice. For this proceeding, Sinclair hired Norman Hecht Research, Inc. to analyze the ratings of broadcast

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85 47 U.S.C. §§ 534-35 (must-carry) and 47 U.S.C. § 531 (access channels).

86 *NPRM* ¶ 25; 47 U.S.C. § 335(b)(1).

87 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244, ¶ 13 (2002).

88 *See supra* Part III.A.

and non-broadcast channels in selected markets.[89] (Exhibit 17). The research indicated that non-broadcast channels now enjoy a share of the television audience which rivals that of broadcast stations. (Exhibit 17). For example, in Las Vegas, Nevada, the individual household prime time audience share of fifteen non-broadcast channels (including HBO, Nickelodeon, TNT, TBS, MTV, A&E, Discovery, Disney, USA, and the Cartoon Network) each equaled or exceeded the household share of Sinclair over-the-air station KFBT during the May 2002 ratings period. (Exhibit 17). Similarly, in Birmingham, Alabama, seventeen non-broadcast channels each equaled or exceeded the household share of two over-the-air television stations. (Exhibit 17). It has been argued that non-broadcast channels should be disregarded or at most counted as a single voice because so many channels are represented in the non-broadcast viewership numbers. Such an argument is patently absurd given the evidence that individual non-broadcast channels now enjoy audience shares that are as great as individual broadcast stations.

Moreover, a different environment is emerging that the Commission has not even considered. The Commission's reluctance to consider cable as more than one voice is particularly perplexing given the fact that cable is quickly becoming the primary means by which digital television is growing, due in large part to the Commission's refusal to mandate DTV performance standards for television receivers. If digital television stations cannot be received over the air but only by cable or satellite, then surely non-broadcast channels provided over the same system must also be recognized as an individual voice on the cable or satellite systems on which they air.

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[89] This data is presented for illustrative purposes and similar results can be found in many other markets across the country.

1. The Commission must consider sources of national news programs and non-traditional news programs for diversity purposes

If, by viewpoint diversity, the Commission means diversity of news in general, then the scope of viewpoints that must be included in any calculation of voices is, in fact, tremendous. Certainly, the Commission must consider the various cable national news channels. In a relatively short period of time, these channels have become a major, if not predominant, source of news information for the public and have demonstrated a phenomenal rate of growth. For example, as of March 2002, CNN reached eighty-six million U.S. cable households from an initial base of 1.7 million households in 1980; Fox News reached seventy-eight million households; and MSNBC reached seventy million.[90] Moreover, these national news channels are increasing their share of the television news audience relative to broadcast television news programs. The share of the National TV News Gross Rating Points captured by the national news channels increased sharply in 2001 from 2000 corresponding with a decrease in the share earned by broadcast television networks.[91] In fact, viewers generally look to cable news channels for coverage of major news events.[92] The declining market share of broadcast

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90 Cable News Wars, OnlineNewsHour with Jim Lehrer, Mar. 2002, *available at* http://www.pbs.org/newshour/media/cablenews (last visited Nov. 15, 2002).

91 *Cable News Audience Share Surpasses Broadcast Nets, Says CNN*, Jack Myers Report, (May 28, 2002). CNN's share grew to 18.2% from 14.4%; Fox News's share to 14.2% from 7.5%; MSNBC's share increased to 10.4% from 8%; and HNN's to 7% from 5.9%. *Id*. On the other hand, NBC's share fell from 26.7% to 16.8% and ABC's from 18.2% to 14%. *Id.* CNBC witnessed a decline in share, and CBS's share increased. *Id.*

92 Kevin Downey, *Viewers, not $s, Drive Cable News Networks*, Media Life, (Sept. 19, 2001). For instance, between September 11 and September 14, 2001, CNN's ratings increased 953%, Fox News saw an increase of 552%, and MSNBC's numbers increased by 459%. *Id*. In contrast, local news suffered a 17% decline in viewership. *Id*. During the D.C. area sniper

television news reflected in these trends indicates that the public is not solely dependent upon news provided by broadcast television stations.

In fact, there is no reason to think that the provision of news is limited to that provided by "straightforward news broadcasts." In seeking comments on the extent to which "non-traditional news programming" contributes to viewpoint diversity,[93] the Commission is correct to recognize the multitude of non-traditional sources of news that provide the same type of information. Acknowledging the existence of such programs is but the first step; the Commission must still properly credit these programs as being a voice comparable to that of a broadcast television station.

Newsmagazines[94] provide investigative and often opinionated coverage of pressing political and social issues. Similarly, Sunday morning talk shows[95] and daily talk shows[96] provide interviews with newsmakers and commentary on current events and issues. In fact, these programs are considered bona fide news programs for purposes of exemption from the equal

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attacks, viewership climbed 39% at CNN, 30% at Fox News, and 29% at MSNBC from the previous month. Weekly Television Ratings, Nielsen Media Reports and Tyndall Reports (Oct. 24, 2002).

93 *NPRM* ¶ 40.

94 Examples include CBS's *60 Minutes*, *48 Hours*, and *60 Minutes II,* NBC's *Dateline NBC*, and ABC's *20/20* and *Primetime*.

95 Examples include NBC's *Meet the Press*, CBS's *Face the Nation*, and ABC's *This Week*.

96 Examples include ABC's *Nightline*, MSNBC's *Hardball with Chris Matthews*, Fox News' *The O'Reilly Factor* and *Hannity and Colmes*, CNN's *Crossfire*, PBS's *The Charlie Rose Show*, and Comedy Central's *The Daily Show with Jon Stewart*.

opportunities doctrine.[97] There is no logical reason to assume that such shows do not serve the same role as traditional broadcast television news programs.

2. Entertainment programs also contain views on political and social issues and must be considered for purposes of diversity

Focusing on news programming ignores the most basic and fundamental fact that television is, and always has been, an entertainment medium. Indeed, the Commission expressly recognized this fact in the prior local ownership proceeding: "television stations . . . are the primary source of news and entertainment programming for Americans. . . . A television drama that raises controversial or important societal issues can not only be entertaining but also shapes cultural attitudes about these issues in significant ways."[98]

Entertainment programs frequently and consistently contribute to viewpoint diversity through discussion of social and political issues.[99] Furthermore, the number of viewers exposed to these issues through entertainment programs is enormous because many of the shows are among the highest-rated and most successful programs. (*See* Exhibit 18) (listing issues explored by program and episode). Examples of programs and issues include:

- *The West Wing* (slavery reparations, campaign finance reform, same-sex marriages, legalization of marijuana, World Trade Organization protests, an

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[97] 47 U.S.C. § 315(a).

[98] *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903, ¶ 18 (1999) (emphasis added).

[99] The content of such programming is provided by the producers of the programming and not the owners of the local television stations. Moreover, stations and networks choose programs based on ratings and profitability, not on what "viewpoint" the program expresses. Indeed, instances of stations preempting programming are relatively rare. *See infra* Part VI.B.

exploration of the events of September 11, the Navy bombing range in Vieques, and tax policy);[100]

- *E.R.* (domestic violence, health insurance, HIV and the workplace, abortion, right to die, assisted suicide, mental illness, affirmative action, and stem cell research);
- *C.S.I.* (the death penalty and DNA evidence, illegal sports gambling, and prejudice against individuals who appear to be from the Middle East); and
- *Law & Order* (racial tensions, abortion clinic violence, illegal immigration, battered-woman syndrome, pedophilia and priests, private adoptions, electoral fraud, insider trading, the death penalty for youthful offenders, and hate crimes).[101]

Comedy programming also falls into this non-traditional category. For instance, the decision of the title character on the CBS sitcom *Murphy Brown* to have a baby outside of wedlock became part of a policy speech by Vice President Dan Quayle in 1992.[102] This example illustrates the tremendous impact that "viewpoints" presented in television entertainment programs have on the American public. Late night comedy talk shows are also an important source of "viewpoint" on television as these shows cover virtually every major news story, person, and current event.

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[100] One television critic recently attacked the viewpoints expressed by *The West Wing*: "In fact, when I do watch it I tend to get ticked off by the smug self-righteousness and the rote Hollywood liberalism of the thing." Tom Shales, *Essential Lessons from 'The Osbournes'*, Electronic Media, Dec. 2, 2002, at 23.

[101] Sinclair compiled this list from www.epguides.com.

[102] Tobin Beck, *Quayle 10 years after Murphy Brown*, Wash. Times, May 9, 2002.

Entertainment programming, like both traditional and non-traditional news programming, contributes to political and social discussion. Moreover, it is extremely influential in defining the cultural mores and attitudes of today's society. Expanding the definition of viewpoint diversity to include such programming leads to the inexorable conclusion that the exceedingly large number of voices in the media marketplace renders Commission regulation unnecessary. Lacking any public interest justification for its ownership policies, the Commission must abandon them.

V. THE COMMISSION'S CURRENT LOCAL TELEVISION OWNERSHIP RULE IS IRRATIONAL

A. The present Eight Voices Test yields anomalous results

The Commission has never indicated how it arrived at the number "eight" in fashioning the eight voices exception to the local television ownership rule, or why calculation of the number of broadcast television stations should be based on Nielsen DMA data.[103] Whatever the purported rationale, the rule does not yield consistent results. A few examples serve to demonstrate this fact.

In 1999, the merger of Viacom and CBS created television duopolies in a number of markets including Pittsburgh, Pennsylvania.[104] Paramount Stations Group of Pittsburgh, Inc., an indirect wholly owned subsidiary of Viacom, was the licensee of WNPA(TV), Jeannette, Pennsylvania. CBS Corporation was the licensee of KDKA-TV, Pittsburgh, Pennsylvania. Both

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103 47 C.F.R. § 73.3555(b).

104 *Applications of Shareholders of CBS Corporation, (Transferor) and Viacom, Inc., (Transferee); For Transfer of Control of CBS Corporation and Certain Subsidiaries, Licensees Of KCBS-TV, Los Angeles, CA, et al.*, 15 FCC Rcd 8230, 8237 (2000).

stations were in the Pittsburgh DMA. Viacom argued to the Commission that eight independently owned and operating commercial and noncommercial television stations would remain in the Pittsburgh DMA following the consummation of the proposed merger and that Viacom could own both stations under the television duopoly rule. In support, Viacom relied on a table identifying eight remaining voices after its proposed acquisition (Exhibit 19), and the Commission approved the acquisition.[105]

The statistics upon which Viacom relied included Station WNPB-TV, Morgantown, West Virginia. However, BIA Financial Network ("BIA"), which produces a television yearbook each year setting forth the stations in each DMA, did not include WNPB-TV in the Pittsburgh DMA in the 1998-1999 yearbook (or even subsequently). (Exhibit 19). Similarly, for at least the last two books, 2000-2001 and 2001-2002, Nielsen has not included WNPB-TV in the Pittsburgh DMA. (Exhibit 19). Thus, according to BIA and Nielsen, the Pittsburgh DMA post-merger contains only seven voices.

A similar anomaly exists in the St. Louis, Missouri DMA. There are presently nine independently owned and operating full power television stations in the St. Louis market according to Nielsen and BIA 2001-2002 statistics. Both Nielsen and BIA include WPXS(TV), Mt. Vernon, Illinois among the nine stations. However, according to the Television & Cable FactBook 2002, the DMA of WPXS(TV) is Paducah-Cape Girardeau-Harrisburg-Mt. Vernon. (Exhibit 20). Thus, depending on the source, there are eight or nine independently owned television voices in the St. Louis DMA. It is incongruous that a decision as to whether there are sufficient voices in a market to permit a duopoly is dependent on how a private enterprise,

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105 *Id*.

Nielsen, defines the market, particularly when reliable, independent sources differ about which stations should comprise a market. Moreover, this inconsistency has a serious practical impact. For instance, in recent negotiations between Sinclair and other large media corporations, the parties and their experienced FCC counsel could not agree as to whether the operation of the rule in the St. Louis DMA would permit a television duopoly.

The Eight Voices Test also treats all markets as if they were identical, which is simply not the case.[106] One such example is Baltimore-Washington, D.C. Washington, D.C. area broadcast television stations are available throughout portions of the Baltimore market and garner ratings in the Baltimore DMA. Under the Commission's Eight Voices Test, the Baltimore market does not have eight independently owned and operated television stations. Given that Baltimore is the 24th largest DMA in the country, it is surprising that at least nine television stations do not exist in this market. Baltimore's proximity to Washington, D.C., the 8th largest DMA, has severely restricted the number of television stations, because the Washington, D.C. stations bleed into the Baltimore market, leaving little room in the spectrum for Baltimore stations to exist. The interrelated nature of Baltimore and Washington, D.C. is supported by the fact that the two cities submitted a combined bid to host the 2012 Summer Olympics, and many D.C. residents travel to Baltimore to see professional baseball.[107] Accordingly, as discussed

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[106] There are numerous examples of inconsistencies in the application of the Eight Voices Test, which Sinclair is willing to provide if the Commission so desires.

[107] *See* Guy Taylor, *Williams vows big Olympics bid*, Wash. Times, June 6, 2002 *available at* http://www.washtimes.com/metro/20020606-66195955.htm (last visited Dec. 23, 2002) *and* Thomas Heath, *O's Angelos Keeps His Interests At Home*, Wash. Post., Nov. 3, 2002, at D1.

below, the only way to truly gauge the competitive nature of the Baltimore market is to count voices from the Washington, D.C. market as well.

According to Nielsen Media Research, all four of the major television network affiliates from Washington, D.C. garner measurable ratings in Baltimore, and collectively, these stations account for a 2.3 household rating and a 6 market share in the Baltimore DMA.[108] Collectively, the four Washington, D.C. stations earn ratings in the Baltimore DMA that are approximately equal to the ratings achieved by four of the six commercial stations in Baltimore. (Exhibit 21). In fact, in Anne Arundel and Howard Counties, which include approximately twenty-seven percent of the households in the Baltimore DMA, individual Washington, D.C. stations routinely have higher ratings and audience share than do several commercial, network-affiliated stations located in the Baltimore DMA. (Exhibit 21). Thus, logically the Washington, D.C. television stations should count as additional "voices" in the Baltimore DMA, but the present Commission rules do not count them at all.

B. The Commission's present Top 4 Rule is illogical

The Top 4 Rule is subject to the vagaries of the marketplace and does not operate in a consistent or equitable fashion. The rule prohibits the acquisition of a second station in a DMA even if the Eight Voices Test is met unless:

> At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research

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[108] Nielsen Media Research, all-day (9:00 a.m.– midnight) Mon-Fri audience share, May 2002.

> or by any comparable professional, accepted audience ratings service . . . .[109]

Those who are purchasing or constructing stations can be adversely affected by the rule whereas their competitors in the market who are not engaged in purchasing a station are not affected. A recent network shake-up in Jacksonville, Florida (DMA rank 53), which occurred outside the context of the Top 4 Rule, provides ample evidence of the inequitable operation of the rule.

In Jacksonville, Florida, Post-Newsweek's station WJXT(TV) dropped its CBS network affiliation after it was unable to reach an agreement on network compensation. Clear Channel station WTEV-TV dropped its UPN affiliation and picked up CBS; and Clear Channel's Fox affiliate, WAWS(TV), picked up UPN (which, like CBS, is owned by Viacom) as a secondary affiliation. Meanwhile, the Gannett Co., Inc. owns WTLV(TV), Jacksonville, the NBC affiliate, and WJXX(TV), Orange Park, the ABC affiliate. As a result, in Jacksonville, Florida, five network affiliations are in the hands of two owners—Clear Channel and Gannett—and this arrangement did not implicate the Top 4 rule because no assignment or transfer occurred.

As the above example illustrates, the Top 4 Rule ignores the fact that network affiliations are private contractual matters over which the Commission has no jurisdiction. Stations may drop or add network affiliations at any time, and the Commission has no involvement in the process. Indeed, even as applied to assignments or new stations, the rule can be circumvented. If the owner of a CBS affiliate purchased a UPN station, there is nothing to prevent that owner from then switching from the UPN affiliation to an NBC affiliation.

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109 47 C.F.R. § 73.3555(b)(2)(i).

Although the Commission has justified its Top 4 Rule on the premise that the top four-ranked stations in a market generally offer their own newscast, that rationale does not cure the inequitable treatment of assignees and transferees as opposed to existing owners described above. Moreover, the Commission has not provided any empirical support to defend the assumption that top four stations offer their own newscast,[110] and Sinclair finds this assumption to be unwarranted. For instance, in Detroit, WWJ-TV, the CBS owned and operated station has dropped local news from its programming.[111] Viacom's Detroit duopoly station, WKBD-TV, a UPN affiliate, will continue airing a local newscast.[112] WKBD's newscast, however, is produced by ABC affiliate WXYZ, which is owned by Scripps Howard.[113] Sinclair itself, for cost reasons, has stopped producing local news for its major network affiliates in Greensboro, North Carolina, St. Louis, Missouri, and Tallahassee, Florida. Thus, the presumption underlying the Top 4 Rule—that major network affiliated or even network owned and operated stations will necessarily produce their own news—is unwarranted.

It is not clear why the Commission has elected to have a Top 4 Rule[114] as opposed to a rule that is specifically targeted to prohibiting mergers of local stations that provide their own

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110 *NPRM* ¶ 78.

111 Dan Trigoboff, *CBS Drops News in Detroit*, Broadcasting & Cable, Nov. 25, 2002, at 12.

112 *Id*.

113 *Id*.

114 The DOJ long ago rejected merger rules assessing market concentration based on the arbitrary selection of a particular number of firms. *See, e.g.,* Stephen Calkins, *1982 Merger Guidelines: The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 Calif. L. Rev. 402 (1983) (discussing the DOJ's adoption of the Herfindahl-Hirschman Index (HHI) over the

substantial local newscasts.[115] Instead, the rule essentially operates to bar mergers between local stations affiliated with the major broadcast networks, ABC, CBS, Fox, and NBC, regardless of whether or not the stations provide news.

The growth in the number of stations that choose to affiliate with a second network and the transition to digital further erode the rationale behind the Top 4 rule. Many stations have secondary network affiliations and stations are free to broadcast more than one network over their digital channel. It makes no sense to preclude one entity from owning both the CBS and Fox affiliate when stations can have dual network affiliations.

Although the Commission does not single out ABC, CBS, NBC, and Fox affiliates as Top-4 stations, its rule preventing the merger between top four-ranked stations in any market appears to be intended to apply to those major broadcast network affiliated stations.[116] While Fox affiliates may generally be in the top four-ranked stations in most DMAs, such stations are unlike those of the other three major broadcast networks. Fox stations provide on average only two hours of programming a day, compared to approximately 12 hours/day for ABC, 10 hours/day for CBS, and 10.5 hours/day for NBC. Fox only provides fifteen hours per week of

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four-firm concentration ratio (CR4), a market concentration measure which considered only the market shares of the top-four firms in a relevant antitrust market).

115 *NPRM* ¶ 78 ("[T]he prohibition against common ownership of two top-four ranked stations in the same market was intended to avoid combinations of two stations offering separate local newscasts.").

116 *See Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policies and Rules*, 14 FCC Rcd 12903, ¶¶ 64-70 (1999) (failing to provide any justification for the choice of the number four).

prime time programming compared to twenty-two hours for ABC, CBS, and NBC.[117] Unlike the other major broadcast networks, Fox does not provide its affiliates with a daily national news program or a primetime newsmagazine program.[118] Additionally, most Fox affiliates do not broadcast more than one hour of local news a day compared with an average of more than two hours per day for the other major broadcast networks' affiliates. Fox also lags behind ABC, CBS, and NBC in the ratings—its highest rated prime time program in 2001-2002 finished the season ranked 43rd. (Exhibit 22). While Sinclair believes that there is no evidence justifying any variation of this rule, if the Commission decides to retain it, the rule should be applied to, at most, those stations which are affiliated with ABC, CBS, or NBC and which provide their own local newscasts.[119]

From a competition standpoint, Sinclair conducted its own study of randomly selected markets to determine potential post-merger market shares of combined top four-ranked stations and to assess whether such a blanket rule was even arguably warranted. The data suggests that mergers between a fourth ranked station and a second or third ranked station in most markets do not generally create excessive market shares in either viewership or advertising revenues. The post-merger combined market share averaged seventeen percent in terms of viewers and less

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117 *See* Doug Halonen, *ABC asked to reduce prime time*, Electronic Media, Dec. 2, 2002, at 8.

118 While the content of a national news program has little to do with local ownership, the Commission appears to be concerned with news programming in general, as discussed above in Part IV.B.

119 Even such a modified rule, however, is irrational. As discussed above, even though there are instances where a station owner may not legally purchase another broadcast television station in the market, the station could nevertheless have all of its news programming provided pursuant to an LMA. Stations can also change network affiliations without any Commission approval.

than thirty-three percent in terms of revenue. (*See* Exhibit 23). These calculations are made on the extremely conservative assumption that television broadcast advertising is the relevant product market—an assumption that Sinclair demonstrates in Part III *supra* is erroneous because television advertising cannot be viewed in isolation. In any event, as discussed earlier, in those specific cases where market share from a combined entity raises anticompetitive concerns, the DOJ or FTC is capable of handling those issues.

VI. THE COMMISSION'S REGULATION OF TELEVISION BROADCAST STATION OWNERSHIP IS INCONSISTENT WITH ITS TREATMENT OF OTHER SIMILAR MEDIA

The Commission has sought comment on whether there are "unique attributes" to broadcasting that justify regulating ownership of broadcast stations.[120] Commission regulations that assume this outdated paradigm to be the case not only serve to put broadcast stations at a competitive disadvantage to other media but are also contrary to any sound public policy goal.

A. The Commission's cross-ownership regulations highlight the unfair, disparate treatment of broadcast television stations and the fundamental lack of logic behind the local ownership rule

Nationwide, large media companies often have a greater potential impact on what viewers see than any local broadcast television duopoly could ever have. Yet, the cross-ownership restriction governing cable and broadcast stations has been eliminated,[121] and the Commission has no express ownership restrictions with respect to other forms of cross-ownership, such as national broadcast networks, cable networks, cable providers, satellite

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120 *NPRM* ¶ 42.

121 *Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027, 1053 (D.C. Cir. 2002), *reh'g granted*, 293 F.3d 537 (D.C. Cir. 2002).

platforms, Internet services, and content providers. The Commission correctly does not perceive this sort of cross-ownership as problematic or see fit to regulate it. The current broadcast television ownership regime, however, stands in stark contrast.[122]

There are numerous examples where a large media company permissibly controls a wide variety of media outlets and sources in a market, yet in that same market a broadcast television station owner is prohibited from owning another station by operation of the Commission's arbitrary and irrational duopoly rule.[123] In Columbus, Ohio, AOL Time Warner: (1) owns the dominant cable system, (2) owns an extremely popular Internet service, (3) owns and programs CNN and Headline News—as well as other cable channels like HBO, Cinemax, TBS (a superstation), TNT, Cartoon Network, and Turner Classic Movies, (4) owns the WB network, (5) is free to start a local cable news channel, and (6) can buy a broadcast station if it so chooses.[124] AOL Time Warner has similar interests in many other markets, including Rochester, New York, as noted in the Introduction.[125] Moreover, pursuant to its "100-plus-market" strategy, where there is no available traditional broadcast outlet for its WB network, AOL Time Warner simply

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122 As noted earlier, Sinclair has no objection to any actual or potential ownership interest of any other media corporation.

123 Sinclair has not attempted to identify every instance of these anomalies, but will do so if the Commission believes that it will aid its determinations in this rule making.

124 *See* Columbia Journalism Review, *at* http://www.cjr.org/owners/aoltimewarner.asp *and* http://www.aoltimewarner.com/companies/clusters.adp.

125 *See supra* Part I.

programs a cable channel as if it were a broadcast affiliate.[126] Presumably, the Commission believes that neither competition, localism, nor "viewpoint diversity" is adversely affected under such circumstances, and Sinclair agrees.[127] But, at the same time, under the Commission's current rules, a television station owner cannot own a second station in those same markets.

An extremely brief survey of the media landscape reveals other examples similar to that of AOL Time Warner. For instance, Viacom, Inc. owns over thirty television broadcast stations, predominantly in major markets like Atlanta, Boston, Chicago, Dallas/Fort Worth, Houston, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C.[128] Viacom owns the national networks CBS and UPN.[129] Viacom cable networks include MTV, M2, VH1, Nickelodeon, Nick at Night, TV Land, Showtime Networks, the Movie Channel, Comedy Central (joint venture with AOL Time Warner), BET, TNN, and CMT.[130] Viacom also owns approximately 150 radio stations. Finally, it owns the national video retailer Blockbuster.[131]

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126 *WB gains new outlet in Gainesville*, Broadcasting & Cable, June 24, 2002 *available at* http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleId=CA224907&pubdate=06/24/2002&stt=001&display=searchResults (last visited Dec. 23, 2002).

127 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* 16 FCC Rcd 6547 (2001) (Commission expressed diversity and competitive concerns and imposed conditions regarding ISP and instant messaging services, not the companies' mass media services.).

128 Columbia Journalism Review, *at* http://www.cjr.org/owners/viacom.asp.

129 *Id*.

130 *Id*.

131 *Id*.; *NPRM* ¶ 28 (noting that ninety percent of households have at least one VCR).

Tribune Company owns or operates twenty-three television broadcast stations and fifteen daily newspapers nationwide and owns twenty-five percent of the WB network.[132] In Chicago, it owns CLTV (a 24-hour local cable news channel), WGN (a powerful local station and a superstation), and a daily newspaper.[133] In Orlando, Florida, it owns Central Florida News 13 (joint venture with AOL Time Warner), a 24-hour local cable news channel, and the daily newspaper.[134]

As a further example, News Corporation owns thirty-three television broadcast stations, the national broadcast network Fox, the national Fox News Channel, the national cable network FX, and twenty regional cable sports networks.[135] News Corporation bundles sales and marketing of its broadcast stations with its cable sports networks.[136]

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132 Columbia Journalism Review, *at* http://www.cjr.org/owners/tribune.asp.

133 *Id*.

134 *Id*.

135 Columbia Journalism Review, *at* http://www.cjr.org/owners/newscorp.asp.

136 Diane Mermigas, *Extreme Fox*, Electronic Media, Dec. 2, 2002, at 19.

> In a more discreet maneuver, Fox increasingly is bundling the sales and marketing of its flourishing regional sports channels with the industry's largest TV station group, which is generating record cash flow even before duopoly economics in nine major markets is fully realized. This "triopoly" approach to creating powerful advertising and promotional platforms is designed to siphon viewers and ad dollars from other local broadcasters and cable operators . . . .

Id.

The joint ownership of many local cable news channels also illustrates the inconsistencies in the Commission's ownership policies. (*See* Exhibit 15). A cable system operator and a national broadcast network may co-own a local cable news channel. For instance, Rainbow Media, a subsidiary of Cablevision Systems Corp. and NBC, owns News 12 Long Island.[137] A broadcast station may own and operate a combined newsroom with a local cable news channel. For example, Allbritton Communications owns both the local cable news channel, NewsChannel 8, and broadcast station WJLA in Washington, D.C., and both operations share one newsroom.[138] Yet joint ownership and operation of two broadcast television stations is often precluded by the existing local ownership restrictions. This sort of distinction prevents broadcast stations from achieving the same operating efficiencies as other media owners and makes no sense in today's media marketplace. Having accepted that media corporations, such as AOL Time Warner, Viacom, Tribune, News Corporation, and others, can legitimately own a wide variety of entities that provide "viewpoints" to the public, the Commission should recognize the obsolescence of its local television ownership restrictions.

B. The Commission ignores the effects of national network control on local television broadcast stations

Most programming decisions are made by national networks, not local station owners—a fact of which the Commission is aware.[139] For instance, the big three broadcast networks

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137 *See* http://www.rainbow-media.com/about/index.html.

138 John Maynard, *WJLA News Director Announces Departure*, Wash. Post, Nov. 7, 2002, at C8.

139 *See, e.g.,* Petition for Inquiry into Network Practices, filed Mar. 8, 2001 by the Network Affiliated Stations Alliance; Steve McClellan, *It's War!*, Broadcasting & Cable, Mar. 12, 2001

program a substantial percentage of the broadcast day.[140] During this time, the local station owner has very little to no opportunity to program content or contribute any sort of "viewpoint." Examples of stations exercising their editorial discretion in deciding not to air network programming are relatively rare because network affiliation agreements impose stiff financial penalties for preemption of network programming.[141] Accordingly, it is only appropriate that the Commission discount the role of local ownership in the promotion of "viewpoints."

For this proceeding, Sinclair hired Norman Hecht Research, Inc. to determine what percentage of a station's total audience is delivered by network programming. (Exhibit 24) (analyzing network time period delivery to total station and non-network delivery for Sinclair stations KOVR, Sacramento, a CBS affiliate; WKEF, Dayton, an NBC affiliate; and WSYX, Columbus, an ABC affiliate). This study found that network programming reaches significantly more viewers than non-network programming. (Exhibit 24) (more than sixty percent of a station's 6:00 am to 2:00 am audience is delivered by network programming).

Despite the fact that broadcast networks effectively dictate the vast majority of programming seen by viewers across the nation, the Commission recently relaxed its oversight of network ownership in the *Dual Network Order*, stating that common ownership of national

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available at http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleId= CA65899&pubdate =03/12/2001&stt=001&display=searchResults (last visited Dec. 15, 2002).

140 Note that for purposes of the above calculation, Fox is not included. *See supra* Part V.B.

141 *See* Petition for Inquiry into Network Practices, filed Mar. 8, 2001 by the Network Affiliated Stations Alliance; Steve McClellan, *Grievance list*, Broadcasting & Cable, Mar. 12, 2001 *available at* http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleId =CA65899&pubdate=03/12/2001&stt=001&display=searchResults (last visited Dec. 15, 2002).

networks would promote "diversity."[142] Yet, the current rule suggests that owning two television stations in a market will somehow harm "diversity," even though local station owners have far less real control over program content than national networks.

For instance, in Columbus, Ohio Sinclair owns WSYX(TV), an ABC affiliate, and provides programming, pursuant to a grandfathered LMA, to WTTE(TV), a Fox affiliate. Under the existing duopoly rule, Sinclair, which provides 11.5 hours of programming for WSYX, is prohibited from acquiring the Fox station. The Walt Disney Company, which programs 12.5 hours a day on WSYX and has more influence on what viewers see in the market, may nonetheless purchase the Fox station. The disparate treatment afforded national network owners and local station owners makes absolutely no sense.

The Commission's more lenient cross-ownership regulations, as discussed above, further exacerbate this unfair treatment. Thus, in the same Columbus, Ohio market where Sinclair is prohibited from acquiring the Fox station, The Dispatch Printing Company owns *The Columbus Dispatch* newspaper, WBNS (the CBS affiliate in Columbus), the Ohio News Network (a 24-hour state-wide cable news channel), and two Columbus-based radio stations, one of which offers "extensive news . . . reports."[143]

VII. THE BROADCAST TELEVISION OWNERSHIP RESTRICTIONS VIOLATE THE FIRST AMENDMENT

The Commission's basis for not repealing local television ownership restrictions has relied almost entirely on the stale premise that the media landscape is identical to that which

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142 *Amendment of Section 73.568(G) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114, ¶ 37 (2001).

143 http://www.dispatchbroadcast.com/wbnsfm.html (last visited Dec 30, 2002).

existed in 1964, when the video market was very different than it is today.[144] As the Commission itself has recognized, dramatic changes in the video marketplace have undermined the need for intrusive broadcast regulations.[145] Government intervention to ensure viewpoint diversity, however defined, and competition is simply not needed or constitutionally sound when there are so many alternative forms of media on which speakers are able to present their views to the public. The Supreme Court's willingness to allow ownership restrictions in the broadcast marketplace has been based on the now obsolete premise that scarcity of viewpoints will lead to a shortage of information being presented to the public. Such fears are clearly unfounded in light of the information overload that exists today. If given the opportunity, it is unlikely that the Supreme Court would allow significant ownership restrictions in today's marketplace because the scarcity assumption is no longer valid.

The Commission itself has announced on numerous occasions that diversity already exists in virtually all media markets. Whatever validity the local television ownership rule may have had at one point no longer exists today. For these reasons, the time has come for the Commission to provide the Supreme Court with its requested signal to reconsider the outdated *Red Lion* standard for broadcast regulation.

A regulation will be sustained only "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than

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[144] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 45 FCC 1476 (1964).

[145] *See, e.g., Syracuse Peace Council v. WTVH*, 2 FCC Rcd 5043, ¶ 37 (1987), *aff'd.*, *Syracuse Peace Council v. FCC,* 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990).

necessary to further those interests."[146] There can be no doubt that the local television ownership rules impinge upon broadcasters' First Amendment rights. Under the current duopoly rules, certain broadcasters are denied the right to acquire additional stations in local markets solely because the government is trying to prevent a nonexistent threat to diversity and competition. The ownership restrictions also have unnecessarily denied television broadcasters the ability to bargain for better programming and have hampered their ability to select the means by which to present material to viewers. As Judge Sentelle noted in dissent in *Sinclair*,[147] the duopoly rules restrict speech because the rules prohibit a broadcaster "from engaging in more speech (through a second station) if [it] owns (or programs more than 15% of the content of) another station." 284 F.3d at 172. Given the First Amendment rights at issue here and the enormous amount of programming and information available to viewers today, the Commission simply cannot justify a local television ownership rule.

Although the Supreme Court has applied more relaxed standards than strict scrutiny to uphold ownership restrictions on broadcasters, *FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775 (1978), these rulings have always been dependent on a finding that there is a scarcity in the number of channels for the distribution of programming.[148] In *Sinclair*, the D.C. Circuit rejected Sinclair's First Amendment challenges, primarily on the ground that the

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146 *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

147 *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, *reh'g denied*, 2002 U.S. App. LEXIS 16619 (D.C. Cir. Aug. 12, 2002).

148 *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) ("*Red Lion*"); *FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775 (1978).

scarcity rationale adopted by the Supreme Court is binding on the D.C. Circuit. As the dissent noted, however, a court of appeals "is not in a position to reject the scarcity rationale even if [it] agree[s] that it no longer makes sense."[149] In short, no case has ever approved intrusive broadcast ownership restrictions without relying on the outmoded finding of *Red Lion* that there is scarcity in the number of available media outlets.

As shown above, this scarcity simply no longer exists.[150] There are now a plethora of media outlets, including broadcast television stations, cable channels, wireless cable, satellite television, broadcast radio, satellite radio, the Internet and wireless devices that increasingly provide news, sports, financial, and other information. In 1984, fifteen years after its *Red Lion* decision, the Supreme Court recognized that the scarcity rationale "has come under increasing criticism in recent years" as "obsolete" in a time when cable and satellite television technology has greatly expanded the availability of video programming.[151] Realizing that the scarcity rationale could be superceded by technological developments, the Supreme Court stated its willingness to re-evaluate the *Red Lion* scarcity standard if given "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* The Commission should now take the opportunity to provide the Supreme Court with its requested signal in the context of this proceeding.

As long ago as 1987, the Commission recognized that the factual underpinnings of the scarcity rationale no longer exist in the media marketplace. In *Syracuse Peace Council v.*

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[149] 284 F.3d at 172 (citations omitted).

[150] *See supra* Parts III and IV.

[151] *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

WTVH, 2 FCC Rcd 5043, ¶¶ 4, 64 (1987), *aff'd.*, *Syracuse Peace Council v. FCC,* 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990), the Commission declared the fairness doctrine unconstitutional based largely on the "explosive growth in the number of and types of information sources available in the marketplace" finding that "the public has 'access to a multitude of viewpoints without the need or danger of regulatory intervention.'" (citations omitted). The Commission concluded that "to the extent that the [Supreme] Court is concerned about numerical scarcity in [broadcasting] … with the explosive growth in the number of electronic media outlets in the 18 years since *Red Lion*, there is no longer a basis for this concern."[152]

In 1987, based largely on "substantial changes in the marketplace," the Commission released a Notice of Proposed Rulemaking proposing a relaxation of its radio duopoly and its one-to-a-market rules.[153] In seeking to modify those rules, the Commission cited the growth of broadcast outlets and new technologies in local markets, including cable television, low power television stations, multipoint distribution systems, video cassette recorders, and print media.[154] Similarly, in 1989 the Commission stated that "the potential risks of undue concentration are far less from a competition standpoint than they may have been in 1964 when the current version of the radio duopoly rule was adopted."[155]

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152 *Id.* ¶ 37.

153 *Amendment of Section 73.3555 of the Commission's Rules, The Broadcast Multiple Ownership Rules*, 2 FCC Rcd 1138, ¶ 23 (1987).

154 *Id.* ¶¶ 15-16.

155 *Amendment of Section 73.3555 of the Commission's Rules, The Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, ¶ 34 (1989).

Two years later, in 1991, the Commission launched the proceeding which ultimately led to the *Sinclair* decision and the remand that is part of the instant proceeding.[156] In the *Local Ownership Proceeding*, the Commission acknowledged the dramatic technological and competitive changes in the video marketplace and environment, stating that:

> [T]elevision broadcasting now exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead … [I]t appears likely that satellite services such as direct broadcast satellite (DBS), increasingly well-financed cable programming services, and greater cable television channel capacity will perpetuate these trends of the last fifteen years into the 1990s.[157]

Commenters in the *Local Ownership Proceeding* presented the Commission with overwhelming evidence that broadcasters are in fact competing with numerous information sources such as cable systems and a multitude of newspapers, radio stations, cable channels, direct broadcast satellites, and the Internet.[158] Yet the Commission ignored the incontrovertible evidence before it—and its own findings—that these many sources of information are viable competitors with television broadcasters in the local marketplace and provide viewers with a vast array of programming choices. Sinclair submits that the Commission should not make the same mistake here.

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156 *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999), *on recon.,* 16 FCC Rcd 1067 (2001) (the "*Local Ownership Proceeding*").

157 *See Review of Policy Implications of the Changing Video Marketplace*, Notice of Inquiry, 6 FCC Rcd 4961, ¶¶ 3, 4 (1991) (citation omitted).

158 *Local Ownership Proceeding Order*, ¶¶ 37, 57.

Recognizing that today's marketplace is very different from that which existed when the Commission first enacted its duopoly rules, FCC Chairman Powell has repeatedly questioned the notion that scarcity in the media marketplace exists and the continued need for intrusive ownership restrictions. As the Chairman (then Commissioner) put it as long ago as 1998, given the proliferation of media outlets, "[t]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace."[159] Similarly, in an interview in February 2001, Chairman Powell is quoted as saying: "I'm skeptical that caps benefit consumers in the form of greater and more diverse products. We have to be able to justify regulatory intervention on something more than sentiment."[160] In an interview on the August 9, 2001 edition of PBS Newshour, Chairman Powell stated that the FCC needs to justify with "much greater precision the kinds of restrictions it places on broadcasters."[161] More recently, the Chairman stated: "[j]ust as the presumptions of *Red Lion* and similar broadcasting regulation based on scarcity have been called into doubt by the proliferation of media sources, so too must we question the continued utility of the pervasive scarcity assumption for spectrum-based services."[162] As the Chairman has recognized, there are more diverse sources of programming now than ever before and no credible threat exists that

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159 Michael K. Powell, *"Willful Denial and First Amendment Jurisprudence,"* Speech delivered to the Media Institute, Washington, D.C. (Apr. 22, 1998).

160 *The Chairman Elucidates*, Broadcasting & Cable, Feb. 12, 2001, at 34.

161 *See* Deborah Kader, *WHPN Owner Files for Bankruptcy*, Wisconsin State Journal, August 15, 2001.

162 Michael K. Powell, *"Broadband Migration III: New Directions in Wireless Policy,"* Speech delivered to the Silicon Flatirons Telecommunications Program, Boulder, Colorado (Oct. 30, 2002).

diversity or competition will be diminished if the Commission does not control the ownership of television stations in local markets and the content of their programming.

The Commission's local TV duopoly rule was established in 1964 in order to promote the broad goals of "diversity," "competition," and "localism" in the media.[163] However, in light of the proliferation in the number of media outlets and the diversification of programming at the local level, the regulations no longer effectuate these goals. Because such rules impermissibly impinge upon broadcasters' First Amendment rights, the Commission should take this opportunity to abolish them.[164]

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163 *NPRM* ¶¶ 2, 78-95.

164 At a minimum, the Commission, lacking support for the continued validity of the scarcity doctrine, must treat broadcast station owners the same as other media owners.

Conclusion

The vast proliferation of media voices over the last ten to twenty years has eviscerated any possible justification for the local television ownership restrictions. Local and national cable channels, broadcast television, direct broadcast satellite, newspapers, and the Internet are all vigorous competitors in today's media market and broadcast television has seen its ratings and revenues decline as a result of that competition.

The local television ownership rule is an anachronism in the 21st century and should be eliminated. The studies conducted by Sinclair comprise an extensive factual record that provides the Commission with ample evidence that the rule is not "necessary in the public interest" and does not serve any ostensible rational purpose.

Accordingly, for the reasons set forth above, Sinclair Broadcast Group, Inc. respectfully submits that there is no longer any valid basis for the local television ownership rule and it should be eliminated.

Respectfully submitted,

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